changed the way in which consumers use mobile handsets, less than five percent of U.S. wireless customers use an iPhone.

Finally, there is no merit to Cox's argument that granting AT&T's Complaint would undermine the pro-competitive benefits that result from Cox's exclusive access to Cox-4. Cox suggests that this exclusive relationship has led it to invest in the development of local programming.[18] And Cox accuses AT&T of attempting to "piggyback on Cox's long-term commitment to providing local news, sports, and entertainment in San Diego." Answer 1; *see also id.* at 5, 9. But AT&T recently sent a letter to Cox explaining that it intends to develop its *own* local programming in the San Diego market,[19] and that AT&T is willing to "relieve Cox from having to provide AT&T with the original local and public affairs programming Cox has developed for Channel 4." Reply Declaration of Christopher Sambar ¶ 16 & Ex. 3 ("Sambar Reply Decl.," separately attached). As this letter explained, AT&T requests *only* the carriage rights to San Diego Padres games, which is "must-have" programming for which AT&T can develop no substitute. *Id.* Thus, whatever pro-competitive benefits supposedly accrue as a result of Cox's exclusive access to Cox-4 could persist, undisturbed, while AT&T could simultaneously achieve a level playing field as it tries to enter the market against a vertically integrated, well-entrenched incumbent.

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[18] This premise seems untenable. Presumably, even if it were required to share Cox-4 with other video providers, Cox would have an incentive to invest in the channel so that it could charge higher licensing fees for it.

[19] Contrary to what Cox argues, Answer 5, 9, AT&T is taking an interest in the San Diego community and is seeking to individualize its service there.

### F. Cox Is Simply Wrong When It Argues That Adjudication Is An Improper Vehicle For The Relief That AT&T Seeks.

Cox argues that AT&T is asking "the Commission to reverse its long line of cases holding that Section 628(b) does not apply to terrestrially-delivered cable programming," Answer 30, and that it would be inappropriate for the Commission to do so in an adjudication. This argument fails for two reasons.

As a preliminary matter, there is ample precedent allowing the Commission to articulate policy through an adjudication. In the recent *Comcast* net neutrality order, for example, the Commission rejected the argument that policy pronouncements may be made only in the context of rulemaking proceedings: "the Commission has often relied on adjudications rather than rulemakings to enunciate and enforce new federal policy."[20]

And in any event, AT&T's Complaint does not ask the Commission to articulate new policy or reverse existing policy. As the program access orders discussed above make clear, the Commission has never suggested that Section 628(b) does not reach the conduct at issue here. To the contrary, the Commission *always* has recognized that Section 628(b) authorizes it to address anti-competitive conduct involving terrestrially-delivered programming where that conduct significantly hinders a competitor from providing satellite-delivered programming. Moreover, as discussed above, the *MDU Order* even more clearly establishes the basic premise at issue here: that Section 628(b) precludes *any* conduct that has the effect or purpose of

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[20] Memorandum Opinion and Order, *Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling That Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* 23 FCC Rcd 13028, 13044-45 ¶ 28 (2008); *see also id.* at 13048-49 ¶ 38 ("[T]o the extent that Comcast implies that our ancillary authority does not extend to adjudications but rather must first be exercised in a rulemaking proceeding, it is simply wrong.").

hindering the provision of satellite-delivered programming to consumers, whether or not such conduct is specifically prohibited under a separate provision of the Act. And the *MDU Order* did not make new law on this point either; rather, it merely gave effect to the plain language of Section 628(b). Cox accordingly had fair notice of the fact that Section 628(b) could be applied to remedy Cox's actions here, as AT&T requests.

## III. AT&T HAS DEMONSTRATED THAT IT IS SIGNIFICANTLY HINDERED IN ITS ABILITY TO COMPETE IN SAN DIEGO, CLEARLY SATISFYING THE TEST IN SECTION 628(B).

AT&T has shown the requisite amount of harm to establish a violation of Section 628(b): that it is significantly hindered in its ability to compete in the provision of satellite-delivered programming. Cox would have the Commission read Section 628(b) to require far more. In Cox's view, AT&T's claim must fail unless AT&T can show complete market preclusion. But the express language of the Act shows that this is not the required standard. Nor is there anything to Cox's efforts to show that AT&T has not been harmed at all: the Commission has repeatedly found that regional sports programming is "must-have" programming, and that competitors and competition are harmed when such programming is withheld. And AT&T's internal market studies, which were done to assess on-the-ground market realities, reinforce these findings in a particularly compelling manner. Indeed, the fact that AT&T has found that it must warn consumers and make them acknowledge *in writing* that the Padres games are unavailable is incontrovertible evidence that Cox's conduct is having a grave, real-world impact. *See* Sambar Reply Decl. ¶¶ 4-5. And AT&T submits an independent study which only further confirms the conclusion that Cox's deliberate withholding is significantly hindering, and will continue to hinder, AT&T in providing a fully competitive alternative that can gain a real foothold throughout San Diego.

### A. Cox's Proposed Test For Actionable Harm Would Create An Impossible Standard That Is Far More Stringent Than What Section 628(b) Requires.

Cox contends that granting AT&T's Complaint would open the door to finding Section 628 violations in any circumstance where a video provider has experienced a lower-than-expected market share. Specifically, Cox argues that "AT&T appears to read Section 628(b)'s reference to 'significantly hinder[ing]' a competitor to mean any competitive act that affects a competitor's ability to achieve its desired market share." Answer 13. This argument is baseless.

AT&T has shown that the anti-competitive conduct at issue here seriously threatens its ability to offer a viable competitive service in San Diego. Without the ability to offer Padres programming, AT&T suffers from lower-than-expected subscriptions and increased churn, and AT&T is struggling to exceed subscription numbers that Cox itself calls **[highly confidential*** ***end]**, Answer 42. Given that AT&T's well-established DBS competitors in San Diego have barely reached 12 percent penetration after many years, AT&T faces a bleak market picture in San Diego unless it can obtain access to Padres programming and bump up its subscription numbers in order to become a meaningful alternative for San Diego consumers in the near future.

But Cox appears to believe that AT&T must demonstrate not only that its market share is seriously compromised, but that it is *totally foreclosed* from participating in the market before it can articulate a violation of Section 628(b). The statute's plain language requires no such thing: a complainant must show only that it is significantly *hindered* in its ability to provide programming, not *precluded* from doing so. Indeed, the statute makes actionable conduct that hinders *or* "prevent[s]" a competitor from providing satellite-delivered programming—a distinction that makes clear on its face that "hindering" is something less than "preventing."

The common-sense definition of "hinder" makes clear that AT&T's showing meets the statutory standard: to "hinder" means to interfere with or delay another's progress. *See, e.g.*, The American Heritage College Dictionary 642 (3d ed. 1993) (to hinder is "[t]o be or get in the way of," "[t]o obstruct or delay the progress of," and "[t]o interfere with action or progress"); Merriam-Webster's Collegiate Dictionary 588 (11th ed. 2004) (to hinder is "to make slow or difficult the progress of: hamper," "to hold back," and "to delay, impede, or prevent action"). Moreover, in interpreting Section 253 of the Act, which precludes actions that may "have the effect of prohibiting the ability of any entity to provide" service,[21] the Commission has found that that provision limits not only actions that actually bar entry but also those that "materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." Memorandum Opinion and Order, *Public Utility Commission of Texas*, 13 FCC Rcd 3460, 3470 ¶ 22 (1997). By the same token, anti-competitive conduct that makes it difficult for AT&T to compete in a fair and balanced competitive environment should be understood to "hinder significantly" AT&T's ability to compete for purposes of Section 628(b).

Furthermore, AT&T has shown that it is in fact *entirely* foreclosed, as a practical matter, from serving a significant portion of the San Diego market. As AT&T's internal surveys and the survey submitted herewith show, many consumers in San Diego will not even consider a video service if it does not offer Padres programming. *See* Complaint ¶¶ 31-36; *id.* ¶ 33 (quoting survey respondent who wrote: "Padres games are the most important television programs in our home. Only providers of Padres games are under consideration whatsoever. No substitute is

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[21] 47 U.S.C. § 253(a).

possible."). Thus, a surprisingly large segment of the market is completely closed to AT&T. And under the standard set out by the Commission in the *MDU Order*, this is sufficient for a violation of Section 628(b). There, the Commission rejected the argument that a video provider must be foreclosed from serving the entire market; instead, the fact that a provider was foreclosed from serving just those customers who live in multiple dwelling units was enough to trigger Section 628(b). *See, e.g.*, *MDU Order*, 22 FCC Rcd at 20245 ¶¶ 18-19 ("Even if exclusivity clauses do not completely bar new entrants from the MVPD market everywhere, they foreclose new entrants from many millions of households, a significant part of the national marketplace. Such clauses could therefore deter new entrants from attempting to enter the market in many areas."); *see id.* at 20250-51 ¶ 29.

Finally, Cox's argument that it is withholding only one channel is beside the point. Section 628(b) requires only that Cox significantly hinder AT&T's ability to provide satellite-delivered programming to consumers, which withholding this one "must-have" channel does.[22] As the Commission has explained, even if competitive video providers "were to be deprived of only *some* . . . 'must have' programming, their ability to retain subscribers would be jeopardized." Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124, 12139 ¶ 33 (2002) ("*2002 Extension Order*") (emphasis added).

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[22] Notably, in the parallel statutory and regulatory prohibitions under Section 628(c), neither Congress nor the Commission has suggested that some minimum amount of programming must be withheld before the defendant has engaged in an improper act: any amount of withholding is deemed actionable, and worthy of redress.

### B. The FCC Has Repeatedly Concluded What AT&T's Studies Show Here: That Cox's And Others' Withholding Of Regional Sports Programming Hinders Competition.

Cox lobs various criticisms at the numerous studies AT&T has performed that demonstrate, among other things, that (1) AT&T's penetration rate has been weakened and its "churn" increased as a result of consumers learning that AT&T's U-verse TV offering does not include Padres programming; (2) a significant percentage of prospective customers are deterred by the absence of Padres programming; and (3) customers who cancel their orders, whether before or after the initiation of service, have in many cases cited the absence of Padres programming as their reason for doing so. As we discuss below, Cox's specific criticisms of AT&T's studies are without merit. But they also miss the point: AT&T's studies were simply on-the-ground, real-world evaluations of phenomena that the Commission already has repeatedly observed—that withholding regional sports programming has a deleterious effect on competition in the relevant market, and that Cox's withholding of Padres programming in particular has rendered the San Diego market less competitive than it rightfully should be.

To begin with, the Commission itself repeatedly has found that certain programming is "must-have," without which an MVPD cannot compete effectively in the marketplace.[23] In the *Adelphia Order*, the Commission specifically found that lack of access to Padres programming caused a 33 percent reduction in the households subscribing to DBS service—a finding the

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[23] *2002 Extension Order*, 17 FCC Rcd at 12139 ¶ 33; *see also 2007 Program Access Order*, 22 FCC Rcd at 17817 ¶ 39 ("We find that access to this non-substitutable programming is necessary for competition in the video distribution market to remain viable. An MVPD's ability to compete will be significantly harmed if denied access to popular vertically integrated programming for which no good substitute exists.").

Commission reaffirmed in the *2007 Program Access Order*.[24] And the Commission has found that vertically integrated cable incumbents like Cox have a continuing, anti-competitive interest in withholding their sports programming, because they stand to profit more from blocking competition than from distributing their programming to competitors.[25]

Cox argues that the Commission's previous findings were mistaken or outdated. But as noted, the Commission recently reaffirmed its findings from the *Adelphia Order* in the *2007 Program Access Order*. And Cox's effort to show that the facts on the ground have changed in some compelling way misfire badly: Cox claims that the Commission can now conclude that the withholding of Padres programming no longer matters because DBS penetration in San Diego has recently increased from 9.5 percent to 12 percent. But these numbers illustrate just how much Cox's conduct continues to matter: across the country, DBS competitors enjoy penetration rates of approximately *30 percent* of the market.[26] The data Cox cites therefore indicate a *60 percent* drop-off in San Diego, illustrating just how much Cox's conduct suppresses competition.

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[24] *See* Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licensees from Adelphia Commc'ns Corp. to Time Warner Cable*, 21 FCC Rcd 8203, 8271 ¶ 149 (2006) ("*Adelphia Order*"); *2007 Program Access Order*, 22 FCC Rcd at 17818 ¶ 39.

[25] *2007 Program Access Order*, 22 FCC Rcd at 17827 ¶ 51 ("[C]able-affiliated programmers continue to have an economic incentive to favor their affiliated cable operators over competitive MVPDs by entering into exclusive agreements. *** Our conclusion ... is reinforced by specific factual evidence that vertically integrated cable programmers have withheld and continue to withhold programming, including both sports and non-sports programming, from competitive MVPDs.").

[26] *See, e.g.*, Press Release, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, Nov. 27, 2007, at 3 (stating that as of June 2006, DBS subscribers now comprise 29 percent of total MVPD subscribers); *see also* Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2507 ¶ 8 (2006) (finding that as of June 2005, 27.7 percent of total MVPD subscribers were DBS subscribers).

Indeed, the very study cited by Cox shows that San Diego's 12 percent penetration rate for alternative delivery systems still ranks *207th* out of *210* DMAs in the United States, similar to what the Commission concluded in the *Adelphia Order*.[27]

Nor does the Commission's "effective competition" finding in San Diego suggest that Cox's actions are harmless. The FCC already has specifically rejected the suggestion that the program access protections are no longer necessary in areas where the incumbent MSO faces competition, finding that a cable operator certainly "will not lose the incentive and ability" to enter into exclusive arrangements "simply because it faces competition from both DBS operators and telephone companies in that area."[28] As the Commission has found, "the key consideration is the market share of the cable operator relative to other competitors," and given that competitors in San Diego do not even *collectively* reach the 15 percent mark in many areas (and that AT&T's share is miniscule), Cox clearly has both the ability and incentive to act anti-competitively to crush its competition.[29] Indeed, it is, if anything, ironic that Cox has relied on AT&T's entry to show "effective competition" even as it seeks to crush AT&T's nascent video offering by denying AT&T the programming it needs to be an *effective* competitor.

AT&T's studies provide real-world reaffirmation of the Commission's conclusions. Whatever Cox may think of the particular methodologies AT&T used, and however Cox may

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27 *See* http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp (visited Nov. 3, 2008) (chart illustrating Nielsen data regarding cable and DBS Penetration as of July 2008); Answer 58 & n.156 (citing the chart); *see also Adelphia Order*, 21 FCC Rcd at 8270 ¶ 146 ("Only four out of 210 DMAs have a lower DBS market share than San Diego").

28 *2007 Program Access Order*, 22 FCC Rcd at 17841 ¶ 72.

29 *Id.* Indeed, even though AT&T's market entry triggered the "effective competition" finding for the cable rate deregulation rules, the Commission has found that the incumbent's incentive to withhold programming and act anti-competitively is particularly strong when a telephone company enters the video market. *See id.*

want to pick at the numbers, AT&T's studies confirm that withholding Padres programming affects a competitor's ability to gain traction, attract customers, and offer a meaningful video alternative. And what is perhaps even more compelling is the fact that AT&T has found—separate and apart from this proceeding—that it can manage churn and cancellation only by making prospective subscribers explicitly acknowledge that they will *not receive Padres programming* when they subscribe to U-verse TV. As Christopher Sambar, AT&T's General Manager for U-verse in the San Diego area explains, AT&T instituted this practice to stem the tide of post-subscription cancellations after only seven months in the San Diego market. *See* Sambar Reply Decl. ¶¶ 4-5. This itself is real-world evidence that the absence of Padres programming presents AT&T with a serious marketplace barrier. There is simply no other reason a company would compel prospective customers to acknowledge a deficit in the company's own products.

This same evidence belies Cox's claim that Padres programming is not "must-have" because it is readily replaceable with alternative programming. To begin with, the Commission already has found that there is a "lack of adequate substitutes for regional sports programming" because of the "unique nature of its core component . . . . [S]ports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[30] And Cox itself loudly trumpets its exclusive access to Padres programming in all of its promotional material relating to Cox-4. *See* Sambar Reply Decl. ¶ 14. The evidence also belies Cox's absurd claim that Cox-4 is not truly a regional sports network because it "carries a diverse array of local

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[30] Memorandum Opinion and Order, *General Motors Corp. and Hughes Electronics Corp., Transferors, and News Corp., Ltd., Transferee*, 19 FCC Rcd 473, 535 ¶ 133 (2004); *see also Adelphia Order*, 21 FCC at 8258-59 ¶ 124.

news, public affairs, entertainment, and sports programming," Answer 6, and because it does not carry every other local sports team. The Commission has never said a regional sports network must carry *several* teams' programming and that it cannot carry anything else. And in any event, to San Diego consumers, Cox-4 is all about the Padres: this is why Cox features Padres programming in its promotion of Cox-4. *See* Sambar Reply Decl. ¶ 14.

### C. Cox's Specific Attacks On AT&T's Data And Studies Are Without Merit.

Cox's attacks on AT&T's surveys and data miss the mark not only because the resulting data reinforce an indisputable conclusion, as discussed above, but because so many of the criticisms are simply misplaced. For example:

> ***Comparing San Diego to*** **[highly confidential*** ***end]** ***provides the most sensible illustration of the impact of Cox's actions:*** Cox complains that AT&T compared San Diego only to **[highly confidential***
>
> ***end]** A comparison to **[highly confidential*** ***end]** provides the best means of doing an apples-to-apples comparison to determine the relative effects of Cox's actions in the San Diego market. To begin with, **[highly confidential***
>
> ***end]** *See* Sambar Reply Decl. ¶ 9.
>
> Moreover, it is virtually axiomatic that San Diego would be more likely to resemble other large metropolitan areas **[highly confidential*** ***end]** with respect to demographic and economic characteristics, along with cultural factors such as subscription or viewing behaviors, than it would markets such as **[highly confidential*** ***end]**, which Cox suggests as appropriate comparison markets. **[highly confidential***

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[31] **[highly confidential***

***end]**

***end]

[highly confidential***

***end]

*Those markets were mostly at a similar stage of maturity:* Cox suggests that AT&T's numbers in San Diego are lower than those in [highly confidential***

***end] In addition, AT&T's calculations all excluded the first three months of service in San Diego—June, July, and August 2007—precisely to avoid Cox's professed concern about "relatively volatile and unpredictable [data] during the period of new market entry," Answer 41.

*Cox's conduct had a significant impact on AT&T as a new entrant:* Cox attempts to minimize the effects of its actions on AT&T's monthly sales rate as amounting to "little more than a rounding error." Answer 42. While the numbers at issue may seem small to an incumbent like Cox, the effect on a new entrant like AT&T is significant. The lower sales rate has already amounted to a cumulative difference in AT&T's installed customer base of [highly confidential*** ***end] customers vs. [highly confidential*** ***end] customers, or roughly [highly confidential*** ***end] in lost revenue per month over the expected lifetime of a typical subscriber. Sambar Reply Decl. ¶ 15. And Cox's assertion that the Commission should disregard the impact on AT&T's sales figures because they are, in Cox's estimate, [highly confidential*** ***end], Answer 42, simply reinforces the fact that even a powerful and effective company like AT&T is having trouble making inroads in San Diego because of Cox's actions. Similarly, Cox's claim that the effect of its actions on AT&T's churn rate [highly confidential*** ***end], Answer 43, is highly misleading: the difference between a monthly churn rate of [highly confidential*** ***end] percent and [highly confidential*** ***end] percent amounts to the average life-cycle of a typical San Diego consumer decreasing from [highly confidential*** ***end] months to [highly

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32 [highly confidential***

***end]

33 [highly confidential***

***end]

**confidential*** ***end]** months—**[highly confidential*** ***end]** of lost revenue per customer.[34]

***AT&T's decreasing churn rate reflects the fact that AT&T began compelling customers to acknowledge the absence of Padres programming—and coincides with a related drop in new subscriptions:*** Cox points out that AT&T's monthly churn rate decreased over time, averaging only **[highly confidential*** ***end]**, Answer 44. To begin with, AT&T's average monthly churn rate for **[highly confidential*** ***end]** percent—meaning that San Diego's churn rate was over **[highly confidential*** ***end]** higher than expected during the later period. *See* Sambar Reply Decl. ¶ 3. Moreover, the **[highly confidential*** ***end]** correlates with AT&T's initiative to ensure that prospective subscribers were alerted to the absence of Cox-4 prior to signing up for service. Over December 2007 and January 2008, AT&T began modifying its point-of-sale order forms to indicate that the customer acknowledged the lack of Cox-4 (and AT&T modified its telephone sales practices accordingly). *See* Sambar Reply Decl. ¶¶ 4-5. Those efforts reduced churn from customers later finding out that there was no Padres programming and cancelling—but they also caused a decline in AT&T's U-verse sales over the same period: **[highly confidential***

***end]** sales per thousand living units, but only averaged **[highly confidential*** ***end]** *See* Sambar Reply Decl. ¶ 6.

***AT&T's surveys were a real-world measure used for real-world strategy:*** Cox attacks AT&T's surveys and data on the grounds that they were not done by "independent qualified experts" and were not studies that follow traditional methodological standards. But these studies were not done for litigation; their purpose was to allow AT&T to perform a real-world assessment of its market options. AT&T accordingly had no reason to bias those studies either way. And as noted above, they confirm the Commission's repeated findings and AT&T's own anecdotal evidence—evidence that led AT&T to adopt the acknowledgement form that new subscribers must execute.

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[34] Cox identified a discrepancy between the churn rate of **[highly confidential*** ***end]** percent shown on Exhibit 1 of the Sambar Declaration and **[highly confidential*** ***end]** percent shown on Exhibit 7 of the Sambar Declaration. *See* Answer 42-43. The former figure (on Exhibit 1) reflects an aggregate churn rate over the relevant time period; based on more recent data, the correct aggregate figure for the time period from September 2007 to July 2008 was **[highly confidential*** ***end]** percent. Sambar Reply Decl. ¶ 13 n.1. The latter figure of **[highly confidential*** ***end]** percent (on Exhibit 7) is an unweighted average of the monthly churn rates for each month during the relevant time period, which presents a better basis for calculation in light of AT&T's increasing subscriber base over the period. *See id.* ¶ 13.

Furthermore, some of the criticisms Cox mounts of AT&T's approach in these studies are simply silly. First, Cox suggests that AT&T introduced a "methodological flaw" by using the term "Padres Channel" to describe Cox-4. *See* Answer 46-47. The channel is commonly known by that name in San Diego and Cox never advertises Cox-4 without mentioning the Padres games that it carries; any studies that did *not* reference the Padres in identifying Cox-4 would have distorted responses because customers would not understand which channel was being asked about. *See* Sambar Reply Decl. ¶ 14. Second, Cox's criticisms of the surveys' allegedly "small" sample sizes of **[highly confidential*** ***end]** for the 2007 and 2008 studies, respectively, are highly misleading. As Cox points out, major polling organizations often use a sample size of 1,000 respondents for *national* polls, *see* Answer 47-48 n.127; such polls of a country with 100 million or more households therefore reach only 0.001 percent of the total respondent pool. This is a smaller fraction—by as much as **[highly confidential*** ***end]**—than the fraction of San Diego households surveyed by AT&T. And Cox's suggestion that **[highly confidential*** ***end]**

### D. The Results Of A Newly-Commissioned Survey By An Independent Expert Confirm AT&T's Results Were Correct.

To test its initial results and observations about the effects of Cox's withholding of Cox-4, AT&T commissioned an independent consumer research firm to conduct a scientific study on the impact that the lack of Cox-4 has on the success of U-verse in San Diego. *See* Declaration of Kenneth A. Hollander ("Hollander Decl.," attached). The results of this independently-conducted study reinforce the conclusion that Padres programming is "must-have" and that the inability to offer such programming significantly hinders AT&T's ability to compete in the market.

The survey—which was designed and conducted in accordance with standards accepted for admission as evidence in the federal courts—polled a group of 410 Internet respondents. *See* Hollander Decl. ¶¶ 7-27. The respondents were divided into two groups of 205 people and shown one of two different mock advertisements for U-verse service. *Id.* ¶¶ 18-19. The Control

Group was shown a "No-Padres Offer," *i.e.*, an advertisement explaining that U-verse service includes a variety of sports programming, but does not include Channel 4. *See id.*, Exhibit 1. The Test Group was shown a "Padres Offer," *i.e.*, an advertisement explaining that U-verse service includes a variety of sports programming, *including* Channel 4. *See id.*, Exhibit 2.

After they were shown the mock advertisement, respondents were asked how interested they would be in learning more about the service, and were given the options of "Very interested," "Somewhat interested," "Probably not interested," "Not interested," and "No opinion." *Id.* ¶ 28 & Exhibit 3. Respondents who had expressed an opinion were given an opportunity to provide a free-form response explaining the reason for their answer, and were then asked a series of questions designed to further explore their interest in U-verse service with and without Channel 4 and Padres programming.

The survey revealed that, overall, more than one out of eight respondents **(13.0 percent)** were influenced with respect to their interest in U-verse television by the unavailability (or availability) of Channel 4 and San Diego Padres programming. *Id.* ¶¶ 49, 57 & Table 7. Specifically, at least **14.2 percent** of all respondents who viewed the "No-Padres Offer" had their interest in U-verse negatively affected by the absence of Padres programming,[35] and **11.7 percent** of all respondents who viewed the "Padres Offer" would have been less interested in the U-verse offer if Padres programming had not been available. *Id.* ¶¶ 49, 54, 56 & Tables 5, 7.

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[35] As discussed in the report, this 14.2 percent figure is conservative: it excludes those respondents who were only "Somewhat interested," and not "Very interested," in U-verse service because Padres programming was not available. Hollander Decl. ¶¶ 49, 51 & Table 2. In fact, these respondents were *subtracted* from the percentage of respondents deemed to be negatively affected (because they still exhibited at least lukewarm interest in U-verse), even though their answers indicate that the absence of Padres programming was a negative factor. *Id.*

The answers to specific questions asked in the survey reveal just how important Cox 4 and Padres programming are to potential customers of U-verse television. Of those respondents who viewed the "No-Padres Offer," a whopping **17.0 percent** of those who were either "Not interested" or "Probably not interested" *independently volunteered* that a reason for their lack of interest was the absence of Padres programming. *Id.* ¶ 51 & Table 2. In addition, **8.5 percent** of those who said that they were only "Somewhat interested" independently volunteered that the absence of Cox 4 and Padres programming was a reason; their open-ended text responses make clear that many of these respondents would have been "Very interested" in U-verse if Padres programming were available. *Id.*; *see, e.g., id.* at Exhibit 5 (open-ended responses stating: (1) "i like the fact you get tons of channels and can dvr more than 2 shows at the same time but i would want channel 4" and (2) "it has some desirable features – like being able to dvr 4 programs. BUT it says the Padre games are not available. Huge drawback!"). Along similar lines, of those respondents who viewed the "Padres Offer" and were "Very interested" or "Somewhat interested" in U-verse service, many stated that they would *no longer be interested* if Padres programming were not included; this translates to **9.3 percent** of the *entire sample* of respondents viewing the "Padres Offer." *Id.* ¶¶ 49, 55 & Table 6.

In short, the results of this independent survey reinforce findings that AT&T and the Commission already have made: a significant number of consumers will not consider a competitor's service if it does not include Padres programming. In other words, the unavailability of Cox-4 and Padres programming prevents AT&T from being an effective competitor when it offers U-verse television service to San Diego consumers.

## IV. DISCOVERY AND DAMAGES ARE APPROPRIATE.

Cox argues that discovery is inappropriate because all relevant information here is in AT&T's hands. Not so. Discovery will allow the Commission and the parties to determine, among other things, what Cox's own data and surveys show regarding the impact of withholding Cox-4 from competitors—on Cox and on its competitors. It will also shed light on Cox's intent in withholding Padres programming from AT&T—while deciding to license it to Time Warner. Other relevant evidence may include information showing how much licensing revenue Cox loses by withholding Cox-4, and how Cox assessed the likely competitive impact of AT&T's entry into the market and how and whether the potential shift in subscribers might affect Cox—all of which could go to Cox's anti-competitive intent in this case. It would also be relevant to understand all the ways in which Cox uses its exclusive access to the Padres in marketing or advertising its services or to otherwise maintain its competitive advantage: for example, does Cox use this information to persuade local advertisers to focus their advertising dollars on Cox versus competitors?

Cox's contention that damages and fines are inappropriate in cases where the Commission is articulating new law, *see* Answer 63-64, is inapposite here. As AT&T has demonstrated, Section 628 clearly applies to the conduct at issue, and Cox certainly could have no settled expectation that its conduct was lawful given (1) the open-ended language of the statute itself; (2) the prior cases which, Cox concedes, reserve the Commission's authority to interpret Section 628(b) to apply to terrestrial programming in some instances, *see* Answer 22; and (3) the more recent *MDU Order*, which should have led Cox to recognize that the

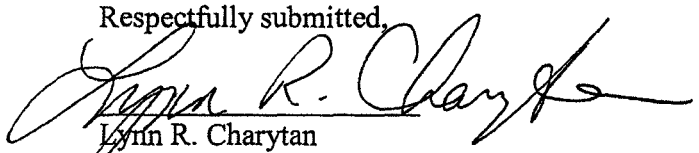
Commission had authority to regulate its particular conduct here. Cox acted abusively at its own peril.

Finally, Cox's claim that AT&T has no right to amend its pleadings is baseless and inconsistent with the Commission's rules, which clearly contemplate and allow for pleadings to be amended. *See, e.g.*, 47 C.F.R. § 76.8(a)(2) (status conference can consider "[t]he necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions"). Cox would have the right to respond in full to any such amendment of the pleadings.

## V. CONCLUSION.

For the foregoing reasons, the Commission should grant AT&T the relief requested in its Amended Program Access Complaint.

Respectfully submitted,



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1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

*Counsel for Complainants AT&T Services, Inc. and AT&T California*

November 21, 2008

**REDACTED – FOR PUBLIC INSPECTION**

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C.**

| | |
|---|---|
| AT&T SERVICES, INC. AND PACIFIC BELL TELEPHONE COMPANY D/B/A SBC CALIFORNIA D/B/A AT&T CALIFORNIA,<br><br>Complainants,<br><br>v.<br><br>COXCOM, INC.,<br><br>Defendant. | File No. CSR-8066-P |

**VERIFICATION OF CHRISTOPHER M. HEIMANN**

I have read the Reply of AT&T to Answer to Amended Program Access Complaint ("Reply") in this matter and, pursuant to 47 C.F.R. § 76.6(a)(4), state that, to the best of my knowledge, information, and belief formed after reasonable inquiry, the Reply is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law. The Reply is not interposed for any improper purpose.

Christopher M. Heimann

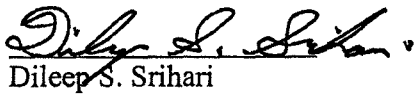
November 26, 2008

**REDACTED – FOR PUBLIC INSPECTION**

## CERTIFICATE OF SERVICE

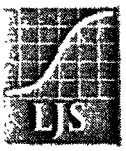
I hereby certify that on this 21st day of November 2008, I caused copies of the foregoing Reply of AT&T to Answer to Amended Program Access Complaint (Redacted Public Version) with accompanying attachments to be served by first class mail, postage prepaid, upon the following:

David Mills
David Wittenstein
Jason Rademacher
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802



Dileep S. Srihari

# ATTACHMENT 6




LEO J. SHAPIRO & ASSOCIATES LLC

# AT&T CONNECTICUT

# V.

# MADISON SQUARE GARDEN, L.P. AND CABLEVISION SYSTEMS CORP.

## A STUDY OF CONSUMER PERCEPTION

November 2010

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# DECLARATION OF PHILIP JOHNSON

I, Philip Johnson, state as follows:

## I. BACKGROUND

1. I am Chief Executive Officer of Leo J. Shapiro and Associates, Inc., a Chicago-based market research and consulting firm that conducts surveys.

2. I have been with this firm since 1971. Over the past 39 years, I have designed and supervised hundreds of surveys measuring consumer behavior, opinion, and beliefs concerning brands and products, employing a wide range of research techniques. I have given lectures before the American Bar Association (ABA), the Practising Law Institute (PLI), the American Intellectual Property Law Association (AIPLA), and the International Trademark Association (INTA) on the use of survey research in litigation. I am a member of the American Marketing Association (AMA), the American Association for Public Opinion Research (AAPOR), and the International Trademark Association (INTA). I have a B.S. degree from Loyola University and an M.B.A. degree from the University of Chicago. A description of my background and a list of cases in which I have offered survey evidence during the past four years are attached to Appendix A of this Declaration.